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United States,[26] and in today's expanded and complex business world, it retains its importance.[27] The decision in the instant case would appear to place the Supreme Court in accord with this view.

Despite the possibility, pointed out by the dissent,[28] of an increased number of stockholder suits burdening the federal courts,[29] the Supreme Court is strengthening the guarantee of an impartial forum wherein stockholder suits may be used to enforce corporate responsibility ". . . without destroying the right of a majority of the members of a corporate body to govern the affairs of that body." [30]

INTERNATIONAL LAW — CONSTITUTIONAL LAW — TREATIES — EXERCISE OF WAIVER PROVISION IN JAPANESE PROTOCOL HELD CONSTITUTIONAL.—On a petition for a writ of habeas corpus and other relief, the District Court for the District of Columbia [1] enjoined the United States authorities from delivering an American soldier to the Japanese Government for trial in the killing of a Japanese citizen.

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[26] See Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* 18 A.B.A.J. 433, 437 (1932). Judge Parker says of diversity jurisdiction:

"No power exercised under the Constitution has . . . had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts." *Ibid.*

[27] See JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 81 (1955).

[28] The dissent declares: "Refusal to sue provides automatic entry." Smith v. Sperling, 354 U.S. 91, 105 (1957) (dissenting opinion).

[29] See Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499 (1928). For a statistical survey of the amount of diversity of citizenship litigation in the federal courts, see JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 94 (1955).

[30] Prunty, *The Shareholder's Derivative Suit: Notes on Its Derivation,* 32 N.Y.U.L. REV. 980, 993 (1957).

[1] Girard v. Wilson, 152 F. Supp. 21 (D.D.C. 1957). The respondent Girard, while guarding a machine gun during a small unit exercise at Camp Weir range area in Japan, had shot and killed a Japanese woman who was gathering expended cartridge cases in the area. The United States claimed the right to try Girard upon the ground that his act, as certified by his commanding officer, was "done in the performance of official duty." Japan contended that his act was not in the line of duty and that therefore Japan had the right to try him. The matter was considered by a Joint Committee which was unable to agree. Thereafter, the United States authorities notified Japan that Girard would be turned over to them for trial. It was at this point that Girard petitioned the district court.

The Supreme Court reversed that portion of the decision granting the injunction and *held,* per curiam, that there was no constitutional or statutory barrier to the performance of a Protocol, made pursuant to an administrative agreement authorized by treaty,[2] for waiver by the United States of qualified jurisdiction granted it by Japan over offenses committed in Japan by members of the United States armed forces. *Wilson v. Girard,* 354 U.S. 524 (1957).

The constitutionality of one of the most controversial [3] articles of the Japanese Protocol [4] has thus been unsuccessfully challenged. Although treaties are the supreme law of the land [5] and a treaty has never been held unconstitutional,[6] it seems that where a treaty is directly contrary to the Constitution the treaty must yield.[7] The Protocol in question did not have specific legislative sanction but the administrative agreement [8] was authorized by the Security Treaty with Japan [9] and was before the Senate when it ratified the treaty.[10]

The respondent Girard claimed, in the lower court, that exercise of the waiver provision would deprive him of fundamental constitutional rights.[11] The Supreme Court avoided the question of loss of

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[2] Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, Sept. 29, 1953, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1846, T.I.A.S. No. 2848 (hereinafter cited as Protocol).

[3] For a detailed discussion on the application of the Status of Forces Agreement, see *Hearings on H.J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs,* 84th Cong., 1st Sess., pt. 1 (1955) (hereinafter cited as HOUSE COMMITTEE HEARINGS).

[4] Protocol art. XVII, para. 3, deals with criminal offenses in violation of the laws of both nations and provides, in part, that the United States shall have the primary right to exercise jurisdiction in relation to offenses arising out of any act or omission done in the performance of official duty and that the state having the primary right may waive its right on request from the other state. There is a similar provision in art. VII, para. 3, of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, T.I.A.S. No. 2846 (hereinafter cited as NATO Status of Forces Agreement).

[5] U.S. CONST. art. VI, cl. 2.

[6] See SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 266 (1955).

[7] Reid v. Covert, 354 U.S. 1, 17 (1957) (dictum); United States v. Minnesota, 270 U.S. 181, 207-08 (1926) (dictum). *But cf.* Missouri v. Holland, 252 U.S. 416 (1920).

[8] 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, T.I.A.S. No. 2492.

[9] 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3329; T.I.A.S. No. 2491.

[10] Wilson v. Girard, 354 U.S. 524, 528-29 (1957). An executive agreement inconsistent with a prior Act of Congress has been declared void [United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955)], while a treaty prevails over a prior inconsistent federal statute. Whitney v. Robertson, 124 U.S. 190, 194 (1888) (dictum). Therefore, the Court in the instant case, by limiting its discussion to whether the agreement was prohibited by *subsequent* legislation (Wilson v. Girard, *supra* at 530) seems to have implied that the indirect authorization by the Senate raised the agreement above the level of an ordinary executive agreement.

[11] Girard v. Wilson, 152 F. Supp. 21, 22 (D.D.C. 1957). For a considera-

individual rights under the Protocol by saying, in effect, that the Constitution does not prevent the United States from waiving qualified jurisdiction granted it by Japan.

Japan, as a sovereign nation, has exclusive jurisdiction to punish crimes committed within its borders unless it either expressly or impliedly relinquishes this jurisdiction.[12] In the absence of such relinquishment, ordinary citizens traveling in a foreign country are not immune from the criminal jurisdiction and laws of that country.[13] However, some authorities claim that, under international law, a special immunity attaches by implication to military forces when in a friendly foreign country.[14]

These claims are usually based on the opinion in *The Schooner Exchange v. M'Faddon*.[15] By way of dicta the Court in that case stated that friendly foreign troops *in passage* through a country enjoyed an exemption from the criminal jurisdiction of that country.[16] This view was later expanded by other dicta in a subsequent case to include immunity for a friendly occupying force.[17]

In any case, this principle applies only when the nation receiving the military forces has not expressly stated its attitude on criminal jurisdiction. The Protocol *expresses* Japan's attitude. It gives concurrent jurisdiction and the primary right to exercise this jurisdiction to the United States in cases where the act in question was done during the performance of official duty.[18] Since the clause permitting

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tion of the constitutional rights to which an accused might be entitled were he subject to United States jurisdiction, see HOUSE COMMITTEE HEARINGS 250-56.

[12] "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions . . . must be traced up to the consent of the nation itself. . . . This consent may be either express or implied." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (dictum). See also 2 HACKSWORTH, DIGEST OF INTERNATIONAL LAW 1 (1941).

[13] *Ibid.*

[14] See, *e.g.*, King, *Jurisdiction Over Friendly Foreign Armed Forces*, 36 AM. J. INT. L. 539 (1942). See also HOUSE COMMITTEE HEARINGS 3.

[15] 11 U.S. (7 Cranch) 116 (1812). The direct holding of this case was that a friendly foreign warship was immune from attachment by one claiming to be its owner.

[16] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 139-40 (1812).

[17] Dow v. Johnson, 100 U.S. 158, 165 (1879). See also Coleman v. Tennessee, 97 U.S. 509, 516 (1878) (dictum). The main issue in both these cases concerned *hostile* occupying forces. For a discussion of the misapplication of the principles of the *Schooner Exchange* case by authorities and a general treatment of the international law relevant to jurisdictional problems both before and after the Status of Forces Agreements, see Re, *The NATO Status of Forces Agreement and International Law*, 50 NW. U.L. REV. 349 (1955). See also Note, *Criminal Jurisdiction Over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

[18] Protocol art. XVII, para. 3(a).

waiver of primary jurisdiction is an integral part of the Protocol,[19] it must be looked upon as a possible limitation on the right of a soldier acting in the line of duty to be tried under United States laws.

In view of the fact that a sovereign nation may validly retain jurisdiction over any act of a foreigner done within that nation, a more basic question, which was not raised by respondent and which the Court did not discuss, is whether the federal government has the power to conscript men during times of peace and send them into a country which does not recognize the constitutional rights of an American citizen. It would seem that the government has this power.[20] At a time when United States foreign policy requires that troops be stationed in a great many foreign countries,[21] the Supreme Court in the instant case has thus held that the wisdom of any arrangement (such as the Japanese Protocol) ". . . is exclusively for the determination of the Executive and Legislative Branches." [22]

It is improbable that the United States could obtain exclusive jurisdiction over all acts of the military in Japan and other countries by treaty.[23] It is therefore the policy of the United States to request a waiver in every case in which a NATO country has primary jurisdiction.[24] In the event that such request is denied and an American soldier is subjected to trial, American authorities ought to make every effort to insure that substantial justice is obtained.[25]

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[19] *Id.* at para. 3(c).

[20] The right of the government to exercise this power in times of peace is well settled. See Cox v. Wood, 247 U.S. 3 (1918); Selective Draft Law Cases, 245 U.S. 366 (1918). These cases do not expressly limit this power to time of war but the war powers of Congress upon which they are based would seem to extend into a time of peace only to cope with a condition of which war was a direct and immediate cause. *Cf.* Woods v. Miller, 333 U.S. 138 (1948). Whether the United States is at present in a state of "cold war," neither a time of war nor of peace [see ORFIELD & RE, INTERNATIONAL LAW 617-19 (1955)] which would extend the war powers of Congress still further does not seem to have been determined. It has been suggested that ". . . it might well be that Congress should be the only branch of government authorized . . . [to declare that such a state existed]." Jessup, *Should International Law Recognize an International Status Between Peace and War?*, 48 AM. J. INT. L. 98, 102 (1954).

[21] See letter from Secretary of Defense, Charles E. Wilson, to Rep. T. S. Gordon, July 1, 1957, as reported in Status of Forces Agreements, Dep't of Defense News Release No. 683-57, para. IV, July 2, 1957.

[22] Wilson v. Girard, 354 U.S. 524, 530 (1957).

[23] See Wilson letter *supra* note 21, at para. II.

[24] See Note, 70 HARV. L. REV. 1043, 1061 (1957).

[25] The NATO Status of Forces Agreement art. VII, para. 9, states: "Whenever a member of a force . . . is prosecuted under the jurisdiction of a receiving State he shall be entitled—(a) to a prompt and speedy trial; (b) to be informed in advance of trial, of the specific charge or charges made against him; (c) to be confronted with the witnesses against him; (d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State; (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the re-